

# Notice

CC-2010-001

November 23, 2009

	Coordination of Docketed Tax Court Cases Involving a Substantial Omission of Income Resulting from	Effective until further
<b>Subject:</b>	an Overstatement of Basis	<b>Cancel Date:</b> notice

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## Purpose

This notice provides direction for handling docketed Tax Court cases in which a taxpayer or entity has claimed an overstated basis in a sold asset resulting in an omission from gross income exceeding 25 percent of the income stated on the return.

## Background

Under section 6501(e)(1)(A), if a taxpayer omits from gross income an amount properly includible therein that is in excess of 25 percent of the amount of gross income stated in the return, then tax may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time within 6 years after the return was filed. Section 6501(e)(1)(A)(i) provides that, in the case of a trade or business, the term gross income means the total of the amounts received or accrued from the sale of goods or services (if those amounts are required to be shown on the return) prior to diminution by the cost of those sales or services. Section 6229(c)(2) addresses substantial omissions of income on partnership returns using language identical to that of section 6501(e)(1)(A).

In Bakersfield Energy Partners, LP v. Commissioner, 128 T.C. 207 (2007), aff'd, 568 F.3d 767 (9th Cir. 2009), the Tax Court held that the six-year assessment period did not apply to a basis overstatement. The Federal Circuit reached the same conclusion in Salman Ranch Ltd. v. United States, 573 F.3d 1362 (Fed. Cir. 2009), rev'g 79 Fed. Cl. 189 (2007), reh'g denied, Fed. Cir. No. 2008-5053 (Nov. 19, 2009). Other courts, however, held in the government's favor on this issue. See Home Concrete & Supply, LLC v. United States, 599 F.Supp.2d 678 (E.D.N.C. 2008); Brandon Ridge Partners v. United States, 2007-2 U.S.T.C. (CCH) ¶50,573, 100 A.F.T.R.2d (TIA) 5347 (M.D. Fla. 2007); Burks v. United States, No. 06-1747, 2009 WL 2600358 (N.D. Tex. June 13, 2008) (order granting in part motion for summary judgment), appeal docketed, No. 09-11061 (5th Cir. Oct. 26, 2009).

On September 24, 2009, Treasury and the Service issued temporary regulations to resolve the ambiguity, acknowledged to exist by both the Ninth and Federal Circuit Courts of Appeals, as to

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whether an overstatement of basis in a sold asset results in an omission from gross income for purposes of sections 6501(e)(1)(A) and 6229(c)(2). See T.D. 9466, 2009-43 I.R.B. 551. The temporary regulations provide that, other than with respect to income from the sale of goods or services in a trade or business, gross income for purposes of sections 6501(e)(1)(A) and 6229(c)(2) has the same meaning as provided under section 61(a). See Temp. Treas. Reg. §§ 301.6501(e)-1T(a)(iii) and 301.6229(c)(2)-1T(a)(iii). Under section 61(a), gross income includes “gains derived from dealings in property.” The regulations under section 61 provide that gain equals “the excess of the amount realized over the unrecovered cost or other basis for the property sold or exchanged.” Treas. Reg. § 1.61-6(a). Accordingly, except in the case of income from the sale of goods or services in a trade or business, any basis overstatement that leads to an understatement of gross income under section 61(a) constitutes an omission from gross income for purposes of sections 6501(e)(1)(A) and 6229(c)(2).

The temporary regulations apply to taxable years with respect to which the applicable period of limitations for assessing tax did not expire before September 24, 2009. Accordingly, the temporary regulations apply to any docketed Tax Court case in which the period of limitations under sections 6229(c)(2) and 6501(e)(1)(A), as interpreted in the temporary regulations, did not expire with respect to the tax year at issue, before September 24, 2009, and in which no final decision has been entered.

## **Procedure**

If you have a docketed Tax Court case in which the temporary regulations may apply, then you must contact the Office of Associate Chief Counsel (Procedure and Administration), Branch 1 at (202) 622-4910 or Branch 2 at (202) 622-4940, as soon as possible, to coordinate Counsel’s position on this issue with respect to your case. In this regard, the Office of Associate Chief Counsel (Procedure and Administration) will coordinate notifying the Tax Court regarding the application of the temporary regulations in affected cases. This notification will entail, at least in part, the filing of an appropriate motion or an amendment to answer. Procedure and Administration has assembled a cadre of attorneys to assist in monitoring and coordinating these cases and they may be contacting you for information or periodic updates. A prompt response to these requests or inquiries is essential to ensure that documents may be submitted to the Tax Court or other necessary action relating to these cases may be taken in a timely manner.

/s/  
Deborah A. Butler  
Associate Chief Counsel  
(Procedure and Administration)